

## MEMORANDUM OF LAW

DATE: March 29, 1991

TO: Kent Lewis, Assistant Personnel Director

FROM: City Attorney

SUBJECT: Double Jeopardy in Disciplinary Proceedings

In the recent disciplinary action taken against Mr. Herven Compton, Mr. Compton received a written note of counseling for failure to notify his supervisor that he had lost his driver's license. Subsequently, his division manager gave him a one-day suspension for the same offense.

As a result of this case, the Municipal Employees Association (MEA) has raised the issue of "double jeopardy" in disciplinary actions, and indicated that such actions are impermissible.

Case law on this issue is divided. Initially, the concept of double jeopardy is not technically applicable to administrative proceedings. As the court in *Devine v. Goodstein*, 680 F.2d 243, 247 (1982) said: "The protections of the double jeopardy clause apply to proceedings that are 'essentially criminal,' not to the type of administrative investigation involved in this case."

While the double jeopardy clause has long been extended to situations beyond those involving "jeopardy of life and limb," it has always been confined to essentially criminal proceedings.

However, while the concept is not technically applicable to disciplinary proceedings, it has frequently been analogized to discipline measures and stands for the principle that one may be disciplined only once for a single set of events. For example, in *Messina v. City of Chicago*, 495 N.E. 2d 1228, 1233 (1986) the court said: "it is a well-settled rule in labor management relations that an employee cannot be punished twice for the same misconduct, even where a contract does not explicitly prohibit such discipline."

In explaining its ruling, the court stated:

The September 3, 1976 suspension was a second, separate and additional penalty for something that had already been disciplined. This constitutes double jeopardy, contrary to the established arbitral rule that only one discipline may be invoked for any one offense, and once invoked cannot be increased.

The so-called double jeopardy rule preventing imposition by management of more than one penalty for a single offense is not seriously questioned in any arbitral authority. It is a salutary and necessary rule going to the very heart of due process and fundamental fairness. If a second penalty may be invoked for one offense, why not a third and where and when will it stop? The worker is entitled to know his case is determined and settled and that further discipline will be applied only if he errs anew.

Id. at 1233.

The discussion by the courts of double jeopardy in a labor context centers around fundamental issues of fairness. Just as an individual may not be punished twice for the same crime, one may not be disciplined twice for the same offense. In that vein, some cases have found that if the first discipline is rescinded no double jeopardy problem exists. In *Zavala v. Arizona State Personnel Bd.*, 766 P.2d 608 (1987), the employee was first suspended for two weeks, then terminated. However, before the termination, the suspension was rescinded and the employee was given back pay for the two weeks of the suspension. In addressing the issue of double jeopardy, the court stated:

Zavala argues that the state denied him due process by imposing two disciplinary actions for one set of deeds. He analogizes to the double jeopardy clause of the fifth amendment and attempts to find  $\varphi\sigma$  fourteenth amendment due process  $\varphi\sigma$  restriction against double

discipline for protected public employees. We need not determine the validity of this analogy, as Zavala did not suffer double punishment in this case. The director's dismissal letter specifically rescinded the suspension and extended Zavala back

pay for the period of suspension.  
The dismissal, thus, was not a  
second disciplinary action, but a  
substitution for the first.

Id. at 608.

However, the court went on to say: "There must be an element of certainty in the discipline procedure used by every State department. Public employees have the right to be treated fairly by their employer . . . ."

It seems clear therefore that while the concept of double jeopardy is strictly applicable only to criminal proceedings, fairness to the employee is of prime concern to the courts. An employee should be secure in the fact that once disciplined he or she will not be subject to additional penalties.

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